SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. [redacted].125

DANIEL RED BIRD ET AL., CITIZENS OF THE CHEROKEE NATION BY BLOOD, APPELLANTS,

vs.

THE UNITED STATES.

No. [redacted].126

THE CHEROKEE NATION, APPELLANT,

vs.

THE UNITED STATES.

No. [redacted]127

FRANCIS B. FITE ET AL., INTERMARRIED WHITE PERSONS CLAIMING TO BE ENTITLED TO CITIZENSHIP IN THE CHEROKEE NATION, APPELLANTS,

vs.

THE UNITED STATES.

No. [redacted].128

THE PERSONS CLAIMING RIGHTS IN THE CHEROKEE NATION BY INTERMARRIAGE, APPELLANTS,

vs.

THE UNITED STATES.

REPLY BRIEF ON BEHALF OF CHEROKEE CITIZENS BY BLOOD.

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K. S. MURCHISON,
Of Counsel.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 20360

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

Nos. 419, 420, 421, 422.

DANIEL RED BIRD AND OTHERS

vs.

THE UNITED STATES.

Reply Brief on Behalf of Cherokees by Blood.

In our brief filed in behalf of the Cherokees by blood we have insisted that no grant of property rights in the funds or lands of the Cherokee Nation can be shown either from the constitution or laws of the Cherokee Nation, from the treaties between the United States and the Cherokees, or from the statutes of the United States, and that if the Indians are to suffer the loss of their property it must be by the technical construction of some statute of the United States which they never comprehended, and by which it was never intended either by the United States or the Cherokee people that the white men should acquire property rights.

Our position in this matter has been confirmed by the brief filed in behalf of the intermarried whites, which fails utterly to refer the court to any law granting the intermarried whites any property rights whatever or in which such grant is even mentioned.

The brief begins by the statement that the question propounded by the Secretary of the Interior to the court was rather unfair and misleading, and that the real question is whether or not persons claiming rights of citizenship in the Cherokee Nation by intermarriage are entitled to enrollment at all by the Commission to the Five Civilized Tribes under the law set forth in the letter of the Secretary, and that the Secretary has erroneously stated that the real question is whether such citizens are to be enrolled "so as to recognize their rights to participate in the distribution of any of the common property of the Cherokee Nation of whatever kind or character." The counsel goes so far as to charge that this was evidently suggested and framed by those opposed to the maintaining of any property rights by the whites. This statement is wholly unfounded in fact. It must be assumed that the Secretary of the Interior, after nearly eight years service in his present position, knows what question he desired the Court of Claims to decide, and that he was able to submit it to the court intelligently and without assistance from others. Counsel for the Cherokee Indians did not assist him.

On page 33 the brief declares:

"These people must be enrolled. When enrolled, *we* will then determine what is the effect of the enrollment on property rights."

This bald proposition is equivalent to saying that the court must give these people a deed to Cherokee property, and after that is done we will determine what the effect is.

The brief, as I understand it, calls upon this court to settle an abstract proposition as to the enrollment of certain alleged citizens in the Cherokee Nation and to close its eyes to the purpose of such enrollment. Strange to say, that is denominated the *real question* in the case.

It is probably the first time the court has ever been invited to construe a statute without reference to the purpose for which it was enacted, and it demonstrates the desperate posi-

tion of the counsel when he asks the court to determine this question wholly without reference to the purposes of Congress in enacting the law. I respectfully suggest that if he hopes to win his client's case he should request the court to close its eyes both to the law and its purpose. If the request he makes was possible in any case, it is certainly not so in this. This case arises out of certain questions of law and fact, which the Secretary determined were of such consequence that they ought to be settled by a judicial tribunal and not by an executive department of the Government. The law provides in such cases that the Secretary may refer such controverted questions of fact and law to the Court of Claims for its findings and opinions thereon for his guidance and action (22d Stat., p. 485, sec. 2).

The question, therefore, before this court is settled by the question which the Court of Claims was called upon to determine by the letter of the Secretary. That question is stated by him to be the right of white persons intermarried with Cherokee citizens to enrollment "so as to recognize their right to participate in the distribution of any of the common property of the Cherokee Nation of whatever kind or character." That was the question which troubled the Secretary and which he felt should be determined by the Court of Claims, and not the question as to whether white men should have their names placed upon a roll wholly without regard to the purposes for which the enrollment was made. While this question, propounded by the Secretary, was pending before the Court of Claims Congress concluded that it was a case involving such important rights that the Court of Claims should be empowered to render final judgment, and that either party, feeling itself aggrieved by said judgment, should have the right of appeal to this court.

When the Secretary of the Interior was executing a law of Congress, the whole purpose of which was the equal and just distribution of the Cherokee property among the citizens entitled thereto, it would have been absurd to submit to the

Court of Claims a question as to whether certain persons were to be enrolled without informing the court that the purpose of such enrollment was for the carrying out of the act of Congress. It is of no consequence to the Cherokees by blood whether these intermarried whites are put upon a dozen rolls of Cherokee citizens, provided they are not enrolled to share in Cherokee property. They may be enrolled for military purposes, for voting purposes, or for the purpose of counting the number of inhabitants. What we protest against is their enrollment to share in the property for which they have never paid and to which they have no just claim. That is the practical question pending before the Interior Department, which was referred to the Court of Claims, and which this court is called to pass upon.

Second. The counsel quotes (page 11) from the case of the Cherokee Nation *against* Journeycake, 155 U. S., p. 196, as follows:

"But it must be borne in mind that the rights and interests which the native Cherokees had in the reservation and outlet sprang from the citizenship in the Cherokee Nation, *and the grant of equal rights as members of the Cherokee Nation naturally carry with it a grant of all rights springing from citizenship.*"

If the counsel can show that the white people have ever been granted, by proper authority, *equal rights as members of the Cherokee Nation,* it will be worth more to him in this case than his forty-four pages of technical argument upon the question of citizen and citizenship. All the other claimants have been incorporated with the Cherokee people and are able to show the grant of equal rights as members of the Cherokee Nation by treaty with the United States and between said nation and the persons so incorporated. It is the want of this grant of equal rights as *members* of the Cherokee Nation that distinctly distinguishes the white men from all other claimants to this property. That there is a difference intended to be made between a citizen of the Cherokee Nation

O'Brien vs. Miller 168 U. S. p. 287 + 29

U. S. vs. Joseph. 94 U. S. 614 & Pueblo Indi

Canal Co. vs. Hill 15 Wall p. 94.

and a member of the nation is shown by the act of Congress of July 1, 1902 (37 Stat., p. 716), section 7 of which says:

"The words 'member' or 'members' and 'citizen' or 'citizens' shall be held to be members or citizens of the Cherokee Nation, in the Indian Territory."

This does not mean that "member" or "members" and "citizen" or "citizens" shall all be held to mean members of the tribe, but, on the contrary, it declares that the words "member" or "members" mean members of the *Cherokee Nation, in the Indian Territory,* and that the words "citizen" or "citizens" mean citizens of the *Cherokee Nation, in the Indian Territory.* The purpose being to set forth in one section that whenever in the body of the act the word "member" is used, it shall designate a member of the Cherokee Nation without adding these latter words in every section, and that when the words "citizen" or "citizens" are used it shall designate a citizen of the Cherokee Nation without the formality of adding these latter words; but the whole section taken together demonstrates clearly that there is a distinction between a member of the nation and a citizen of the nation. If this had not been the purpose, then all four of the words quoted in the section would have been construed as meaning a member of the nation, when in fact it declares that two of them shall mean member and two of them shall mean citizen, and that consequently these two words mean different things.

On page 10 the counsel quotes from section 21 (30 Stat., pp. 502-503) to the effect that the Dawes Commission are to enroll

"such intermarried white persons as may be entitled to Choctaw and Chickasaw citizenship under the *treaties* and *laws* of said tribes,"

and claims that that provision is identical with that for the Cherokees in the same section as follows:

"with such intermarried white persons as may be entitled to citizenship under Cherokee laws."

He omitted to quote the Choctaw and Chickasaw treaty, which, after providing for the selection of lands by members of the tribe, agreed that—

"The right here given to the Choctaw and Chickasaws respectively, shall extend to all persons who have become citizens by adoption or intermarriage of either of said nations, or who may hereafter become such."

If the intermarried whites in the Cherokee Nation can produce a grant to them of this character by treaty with the Cherokees, then the cases will be similar; otherwise there still remains the difference between them that one has a right granted by the owners of the property by solemn treaty, whereas the others are simply claimants because they possess a certain limited citizenship by marriage.

He further quotes from the same section 21 as follows:

"The roll so made when approved by the Secretary of the Interior, shall be filed and the persons whose names are found thereon, with their descendants thereafter born to them, *with such persons as may intermarry according to tribal laws shall alone constitute the several tribes which they represent.*"

This, of course, can have no application to the Cherokees, for the act of the Cherokee council approved December 16, 1895, as also the previous act of November 28, 1877, denying all property rights to intermarried whites, were both in force when the act of Congress was passed.

On page 11 of his brief counsel quotes section 26, act of July 1, 1902 (32 Stat., p. 720), which declares that no white persons intermarried since December 16, 1895, shall be entitled to enrollment or to participate in the distribution of the tribal property of the Cherokee Nation. He follows that with the act of the Cherokee council to the same effect, approved December 16, 1895.

He quotes also from Whitmire *vs.* Cherokee Nation (30 Court of Claims, p. 187), which specifically holds that—

"The court does not intend to express an opinion concerning the constitutional rights of these adopted citizens in the common property of the Cherokee Nation,"

which wholly excludes the intermarried whites from the effect of that decision. He then declares that the above act of Congress unmistakably shows that there was a class of persons who, having married prior to December 16, 1895, were to be enrolled, *embracing all lawfully married according to the laws of the nation,* and were to participate in the distribution of the tribal property of the Cherokee Nation. This is what may be termed a grant of land by back action. Not a single word of the act, either directly or remotely, says that these intermarried persons have or are to have any interest in the property of the nation. On the same theory, if Congress should pass an act declaring that it should be unlawful for any person to take and carry away the furniture in the rooms of the Supreme Court of the United States after the date of the act, it would then have committed itself to the proposition that prior to that time it was perfectly lawful and proper for any one to take and carry away the furniture from the Supreme Court rooms.

Some years ago a measure was submitted to Congress providing for the protection of the President of the United States against assault or personal injury. According to the theory of the counsel, Congress thereby committed itself to the monstrous proposition that prior to that date it was perfectly legal and proper to make an unwarranted assault upon the person of the President.

But even if this act of the Cherokee council should have a reactionary effect, it does not necessarily follow that, because it declares that all non-citizens thereafter marrying should acquire no property rights, therefore *all* who married prior thereto actually acquired property rights. It would be properly limited under any circumstances to those who between 1875 and 1877 acquired property rights under the provisions of the law then in existence, which empowered

them to do so by the payment of $500, and would leave out all others who had failed within the time limited above to take advantage of that opportunity. The denial of *any* property rights does not imply the former possession of *all* such rights, even if any implication at all is possible.

The question of property rights had never been in any way raised by the intermarried whites, and hence the errors in the compiled laws had not been called to public attention, nor had any questions involving their construction been brought in the courts by white persons claiming rights in Cherokee property. Under these laws the whites had never at any time claimed any of the funds paid out to the Cherokee, Delaware, and Shawnee citizens, constituting a number of different payments, and amounting to millions of dollars. As no Cherokee ever supposed that property rights had been granted to the intermarried whites, and as none of these intermarried citizens had in the whole history of the Cherokee Nation laid claim to such rights, the contingency of such a claim had never been brought forward for a decision. As soon, however, as the intimation by the Court of Claims in the Whitmire case became known, to the effect that the intermarried whites might have some claim to property rights, the Cherokee council immediately passed the act of December 16, 1895.

When the Court of Claims in the Whitmire case let drop some expressions which indicated that the white men might be, not only citizens, but possibly members of the nation, the Cherokee national council passed the act approved December 16, 1895, amending chapter XII, article XVI, sections 659 to 669 of the *Compiled Laws* of the Cherokee Nation, which had erroneously omitted from the compilation that provision of the previous act which had distinctly stated that intermarriage should confer no right of property in the Cherokee Nation. By act of November —, 1877, they had amended the original statute relating to intermarriage so as to deny intermarrying whites any right in Cherokee prop-

erty, and by the act approved December 16, 1895, they amended the compiled statutes which by reason of the errors in it had misled the Court of Claims into the erroneous theory that the white men might possibly be entitled to property rights. The truth of the situation, therefore, is that the Cherokee council has both amended the law itself and the compilation of the law, thereby evincing an unalterable determination to prevent the encroachment of the whites upon the property rights of the Cherokee people.

After quoting from the compilation of the Cherokee laws those sections relating to intermarriage of white citizens, counsel, at the bottom of page 25 of his brief, asserts:

"All citizens who married under the law as contained in these two compilations, are entitled to citizenship under Cherokee law, for that was the law until the enactment of the act above mentioned, on the 16th day of December, 1895, after which time the agreement says that no intermarried citizen shall be enrolled."

The act of the Cherokee council above quoted does not pretend to deny citizenship to the whites who married subsequent to the date of its approval; it simply declares that no property rights shall follow such marriage, and amends the compiled laws of the Cherokee Nation so as to conform to the amendment to the original statute, which amendment had been adopted November 28, 1877. Again may it be said that if under these sections of the compiled laws quoted by the counsel all intermarried citizens were entitled to citizenship under Cherokee laws, why was it that Congress limited the enrollment by section 21 of the act of 1898 (30 Stat., p. 495) to only "such intermarried white persons as may be entitled to citizenship under Cherokee laws"? All intermarried whites are citizens of a certain class, but only those that may have acquired property rights, if any, are such citizens as the law requires to be enrolled.

That there is more than one class of citizens in the Cherokee Nation is demonstrated by the law quoted by the counsel

for the intermarried whites. The act of December 16, 1895, denies property rights, but leaves the whites marrying subsequently citizens of the nation, and, according to the contention of the counsel, those married prior to that date have property rights and those marrying since that date have no property rights, showing clearly that by his own contention there are two classes of citizens in the Cherokee Nation. The only question, therefore, is, When did the right to Cherokee property, if it ever existed, cease to follow the intermarriage of a white person with a Cherokee woman? Did it cease when the original act granting such right was amended, November 28, 1877, or did it cease only when the council also amended the compilation of laws, December 16, 1895?

On page 27 counsel quotes as follows:

"That any white man who shall lawfully marry under the provisions of this act, and then, or afterwards abandon his wife, shall not be entitled to any of the rights and privileges of a citizen of the Cherokee Nation."

He draws the conclusion that the converse of the last proposition must, of course, be true, that so long as he remained faithful to his wife he would be entitled to all the rights and privileges of a citizen of the Cherokee Nation. This is another alleged grant by contraries. This new doctrine that the denial of a right is really the grant of a right is not supported by any authority from any source whatsoever. It is probably asserted here for the first time in the history of legal proceedings, and is evidently devised for the purpose of enabling these white men, who have no right whatever, to take away from the ignorant and unprotected Indians a large share of the little remaining property left to them after the spoliation by the whites during our whole existence as a nation. No such doctrine, I am sure, has ever been applied in any instance between the whites, and if it is to be made the means of taking from these Indians their property it will be necessary to reverse the long established doctrine that, as between

the whites and the Indians, the laws are to be construed most favorably to the latter.

Counsel declares on the same page:

"It would be an absurdity to provide that one could lose or forfeit by any act a right which he had never acquired or possessed."

This would not be, however, half as absurd as to hold that when a white man is by virtue of his own wrong declared not entitled to *any* of the rights of a Cherokee citizen that he is thereby declared to have been entitled to *all* of the rights of a Cherokee citizen, and that the denial of any right in the future is the grant of all rights in the past.

On pages 29 to 30 the brief quotes the cases of—

Raymond *vs.* Raymond, 83 Fed. Rep., 721;
Nofire *vs.* U. S., 164 U. S., 657;
Nivens *vs.* Nivens, 133 Fed. Rep., 40,

to show that the courts of the Indian Territory obtained jurisdiction, criminal and civil, over intermarried white persons. No denial of this proposition has ever been made by us. On the contrary, we think the conclusions announced in those decisions are correct, because in each of the Cherokee intermarriage laws it is declared that—

"the peace and prosperity of the Cherokee people required that in the enforcement of the laws, jurisdiction should be exercised over all persons who may from time to time be privileged to reside within the territorial limits of this nation."

It was for the sole purpose of obtaining jurisdiction, for civil and criminal purposes, over white men intermarrying with Cherokees and privileged to reside in the territorial limits of the nation that the laws relating to intermarriage were passed by the Cherokee council. These laws expressly provided that such intermarrying white persons should take an oath subjecting themselves to the laws of the Cherokee

Nation. Our contention, however, is that obtaining jurisdiction to try criminals within a certain territory does not operate as a grant of lands or funds, and the brief of the opposing counsel contains no authority announcing such an extraordinary doctrine. If the above decisions quoted by counsel decide any point now in controversy, it is directly the opposite of the counsel's contention.

On page 31 he quotes from the case of Raymond as follows:

"His adoption into one of these tribes has the effect to bestow upon him the privileges and immunities of its members, and subjects him to the laws and usages of the tribe, but it *has no greater effect.*"

That distinctly states our position that these intermarried whites are subjected to the laws and usages of the Cherokee Nation by the intermarriage laws quoted in the briefs, and that these laws have no greater effect.

On page 30 the counsel refers to the provision of the Cherokee Constitution declaring who shall be citizens, and insists that the provision is prospective in its effect. In our brief, heretofore filed, we give our reasons for contending that it is not prospective, but that it simply declares that certain persons then living in the Territory are citizens, and that the future citizenship is to be composed of the descendants of such persons. Whatever may be the view of the court upon this question, however, it is clear that this citizenship related solely to political rights. It occurs in section 5 of the amendments to article 3 (Cherokee Laws 1892, p. 33), which article is devoted solely to the political branch of the government, stating what shall be the qualifications of the members of the national council and what the qualifications of the electors. No reference whatever to the property of the Cherokees or to property rights is made in either one of the seven sections of these amendments to article 3 of the Cherokee Constitution.

In addition, we insist that the Cherokee people, neither in convention assembled nor in their legislative department, had any authority to pass laws affecting the right and title to their

landed estate or to their vested funds, and that if an attempt had been made, which was not, to grant rights of property to persons other than Cherokees, it would have been utterly futile without the previous assent of the United States given by convention or treaty, as specifically set forth in the United States statutes.

The act of Congress of 1902 is sometimes called the Cherokee agreement. It is, however, only an act of Congress which, being submitted to the Cherokee people, was lost by the Cherokee vote, but was carried by the vote of 2,500 white persons who were trying to vote themselves a right to the property of the Cherokee people.

Section 25 of that act, however, provides:

"That only such persons are to be enrolled as are living September 1st, 1902, and who are *entitled to enrollment on that date.*"

The Cherokee people did not then and do not now understand that the intermarried whites were ever entitled to enrollment for the purpose of taking their property, and they have from the beginning to the present day contested this proposition with all their might.

On pages 33 and 36 counsel embodies long abstracts from certain reports of the Dawes Commission. None of these was offered in evidence before the Court of Claims, and we submit that they are not now properly embraced in this brief. It would be manifestly unjust to permit one counsel in a case to produce on an appeal such portions of documents as he considered were favorable to his clients without having offered them before the trial court and without an opportunity upon the part of the opposing counsel to object. It violates rule 1, paragraph 2, of the rules of this court involving appeals from the Court of Claims.

If these abstracts, however, show anything of value, it is that the Secretary of the Interior, having once decided that the intermarried whites were entitled to be enrolled by the Dawes Commission, was so impressed with the protest of the

Cherokees by blood and their legal rights as set forth therein that he stopped such enrollment and determined to take the opinion of the judicial branch of the Government before he would finally enroll any white men for the purpose of taking Cherokee property; and, further, that the total number of intermarried whites who have made application is 3,549 (Brief, p. 36), all of whose claims are placed among the doubtful claimants until this case is decided by this court.

The brief, on page 38, contains what is called the political platform of one of the several factions in the Cherokee Nation. The counsel ought to know that political platforms, like railroad platforms, are intended to get in on, but not to stand on. This has been clearly illustrated in this case, for after the petition was filed in the Court of Claims the Cherokee Nation, by its principal chief, filed a petition requesting the special permission of the court to intervene in the case, and from that day to the present it has fought the claims of the intermarried whites. This platform is the only document in the whole history of these people which undertakes, even by remote inference, to give to the intermarried citizens an equal share in the lands and funds of the Cherokee people. Its introduction here is evidently the last hope of these claimants, and it must be a surprise to this court to find that a claim for millions of dollars' worth of property should have for its foundation the shifting, uncertain, and flimsy plank of a political platform.

On page 38 the brief declares that Congress by the act of 1888 "had declared that a white man marrying an Indian woman, a woman of one of the Five Civilized Tribes, according to the laws of such tribe, acquired the right to tribal property and privileges." The act referred to is found in 25 Stat., p. 392, quoted in counsel's brief on page 41. The act simply prohibits white men marrying Indian women other than those of the Five Civilized Tribes from acquiring any tribal property, privilege, or interest, and because Congress chose to except the Five Civilized Tribes the counsel draws the conclusion and asserts that Congress thereby declared

that a white man marrying an Indian woman of the Five Civilized Tribes did acquire tribal property. This is another one of his numerous alleged grants by back action. The history of Indian legislation shows that Congress has legislated for the Five Civilized Tribes as a distinct body of Indians, who were entitled to different provisions of law from the general class of Indians, but this is the first instance in which such exception from the provisions of their laws is made to carry a direct grant to intermarrying white men. Such arguments in behalf of the intermarried whites must emphasize the fact that there is nowhere any real grant of property rights to them, or their learned counsel would not advance before the court such extraordinary propositions.

On page 40 counsel quotes from the opinion of Chief Justice Fuller in the case of Stevens against The Cherokee Nation, in which it is held that there seems to be a distinction between *admission to citizenship* merely and the distribution of property to be subsequently made. He construes that as being satisfactory, because he says:

"A Cherokee might be *born* after the rolls are closed and get no land, though he might be a citizen of the nation, if it was then in existence."

It will doubtless be a great surprise to the court to find that admission to citizenship referred to as taking place under the act of 1898 is the same thing as being born after the rolls are closed. Admission to the citizenship of a country is one thing; being born a native of a country is an entirely distinct thing.

On page 42 of the brief it is stated that the act of the Cherokee council of 1886 (R., 24) was utterly overthrown in the Whitmire case. This seems to be a most unfortunate reference for the counsel. The truth is that in the first Whitmire case (30 Court of Claims, p. 138) this act of the Cherokee council was declared unconstitutional and void, so far as it affected the freedmen. No one, however, has ever

pretended that the freedmen and the intermarried white citizens stood on the same plain or derived their alleged rights from the same source. But the Court of Claims in its decision in the Whitmire case (p. 152) utterly overthrows the claim of the counsel that every citizen is entitled to share in Cherokee property. After quoting the Cherokee law the court declares:

"The idea therefore existed, both in the mind and in the laws of the Cherokee people, that citizenship did not necessarily extend to or invest in the citizen a personal or individual interest in what the constitution termed 'the common property,' 'the lands of the Cherokee Nation.'"

If the Cherokee act of 1886 was utterly overthrown and if every citizen of the nation is entitled to property rights by virtue of his citizenship, the court will naturally want to know why it was that the white men have stood idle since the decision in the Whitmire case, made March 4, 1895, and made no claim and asserted no right of any sort to share in the large sums distributed to the other citizens of the Cherokee Nation. Why was it that they saw the Court of Claims in the second Whitmire case (30 Court of Claims, p. 180), decided March 18, 1895, distribute $7,240,000 to the citizens of the Cherokee Nation having property rights, giving to the freedmen $903,365 (p. 193) and the white men obtain no share of these millions and make no claim. So far from the court in either Whitmire case deciding in favor of the white men, it distinctly holds (30 Court of Claims, p. 188) that it does not intend to express an opinion as to the constitutional rights of the intermarried whites to any property in the Cherokee Nation.

Counsel also quotes from the veto message of Chief Bushyhead. He should have supplemented that with the statement that the representatives of the Cherokee people by two-thirds vote overruled the veto message of their chief and passed the act, such objections to the contrary notwithstanding. We submit that the great majority of the people's representatives

in the national council in both houses will come nearer interpreting the opinion of the people than their chief would do.

The burden of the argument of the counsel for the intermarried whites is that they are called citizens, and that Congress has directed that citizens shall be enrolled. We have demonstrated, we think, that all citizens are not to be enrolled, but such citizens only as are entitled to enrollment for the purposes of the act of Congress. But if Congress had declared that all citizens of the Cherokee Nation should be enrolled so as to take the property of the Cherokee people, we insist that Congress would have been without authority to do so.

This court has declared in numerous cases that the title of the Indians was such an interest in the soil that the United States was bound to respect it, as much so as if it had been a fee-simple title. That has been the law of this land from the beginning, and the United States has always so far recognized the title of the Indians that it would not deprive them of their landed property except by treaty stipulation. Congress has never claimed the right to dispose of Indian land without the consent of the Indian tribes, and it has under the Constitution of the United States no authority whatever to take away from the Indians either their lands or funds and bestow any part of them upon any other people. They might with equal justice have taken the lands of the Cherokees and given them to the Choctaws and Chickasaws or to any other one of the Five Civilized Tribes or to any other Indians or to the citizens of the United States as to give them to these intermarried white persons, whose sole claim arises out of the fact that they were living in the nation, and that for purposes of government only the Cherokees passed a law assuming control of them and requiring that they subject themselves to the laws of the land in which they lived. If the Cherokees had undertaken to bestow upon these whites property rights in Indian property such an attempt would have been null

and void, for there never has been a day since the United States assumed supervision over and responsibility for the Indian tribes that any Indians had authority to dispose of their property without the assent of the United States.

JOHN J. HEMPHILL,
Attorney for Cherokees by Blood.

K. S. MURCHISON,
Of Counsel.

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Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

Nos. ~~125, 126~~, 127 & 128.

DANIEL RED BIRD AND OTHERS, CITIZENS OF THE CHEROKEE NATION BY BLOOD, APPELLANTS,

vs.

THE UNITED STATES, APPELLEE.

In connection with the printing of the Cherokee constitution, laws, and treaties, I beg to make the following statement:

During the argument the chief justice suggested to counsel that they have printed for the use of the court so much of the constitution and laws of the nation, not already printed, as had been cited in the briefs or the record, together with the treaties between the Delaware Indians and the Shawnee Indians with the Cherokee Nation.

Mr. William Henry White, of counsel for the intermarried whites, secured the loan of my Cherokee law books for the purpose of having the above papers printed. At my suggestion, he sent me the printer's proof of the papers agreed to be printed. This I examined and consented to as containing all necessary articles, and he agreed to have them printed accordingly. Instead of printing only what was mutually agreed upon he afterwards inserted (page 27 of the printed paper) an alleged construction by the Interior Department of section 5 of article 3 of the Cherokee constitu-

tion. This was inserted without my knowledge or consent. I am not bound by it and do not admit its correctness. He also inserts page 33, what purports to be an act of the Cherokee council of December 4, 1894. This may or may not be correct. I have no means of verifying it, as the last volume of Cherokee laws in print was published in 1892.

He has also printed in large type on page 7 a statement of C. J. Harris, chief, declaring the Compiled Laws of 1892 to be in force as the laws of the Cherokee Nation. This is misleading, because the act of November 22, 1892, providing for this compilation, contains no authority to the chief to make such a declaration.

These insertions may not be important, but I cannot be placed in the attitude of agreeing to a construction of the law contradicting the position taken in my brief. I desire the court to know that these insertions were made without my knowledge, and in my judgment are both unfair to the appellants' counsel and to the court.

JOHN J. HEMPHILL,
Attorney for Cherokees by Blood, Appellants.